

March 7, 1995

DOCKET NO. P-3122/C-93-1023

ORDER ACCEPTING SETTLEMENT AGREEMENT

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm
Tom Burton
Joel Jacobs
Marshall Johnson
Dee Knaak

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Complaint Against Hertz
Technologies, Inc.

ISSUE DATE: March 7, 1995

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PROCEDURAL HISTORY

I. The Complaint

In the fall of 1993 two Minnesota businesses, United Bankers' Bank and Conveyors, Inc., filed complaints with the Department of Public Service (the Department) against their former long distance carrier, Hertz Technologies, Inc. The businesses claimed Hertz had provided telephone service without a certificate of authority and had overcharged them for the service provided. United Bankers' Bank (the Bank) also claimed that Hertz's agent had induced the Bank to sign a contract for service by misrepresenting its cost in comparison with the cost of service from other long distance carriers.

On February 15, 1994 the Department filed a report and recommendation stating it believed the central issue was whether Hertz was or had been providing service without authority. The report stated the Company had provided service before its June 30, 1993 certification date and recommended referring the matter to the Office of the Attorney General for penalty proceedings.

II. The Settlement Agreement

On April 25, 1994 the Department and the Company filed a Settlement Agreement. Under the agreement the Company agreed to pay \$350 in lieu of penalties and to refund overcharges resulting from a two-month computer programming error. The Department agreed to recommend that the Commission take no further action against Hertz. The agreement was not to be construed as an admission of liability by Hertz or as an admission that Hertz had provided intrastate service without a certificate of authority.

The Settlement Agreement came before the Commission on August 2, 1994. United Bankers'

Bank appeared at the hearing and spoke against it, claiming its refund provisions did not adequately compensate the Bank for financial losses attributable to its reliance on misrepresentations made by Hertz's agent. Conveyors, Inc. had reached a settlement with Hertz and did not appear.

On August 15, 1994 the Commission issued its ORDER REJECTING SETTLEMENT AND REQUIRING FURTHER FILINGS. That Order rejected the Settlement Agreement on the basis of insufficient information and asked the Department to explain in more detail the factual basis of the Bank's complaint, the Department's reasons for concluding that no further refunds are in the public interest, the range of remedies available to the Commission for resolving the two complaints, and alternatives for dealing with any unauthorized provision of service by the Company.

III. Subsequent Filings

On September 30, 1994 the Department made a filing addressing the issues identified in the August 15 Order. The Department also detailed its reasons for entering into the settlement, which it still supported and urged the Commission to accept. On October 13 Hertz filed comments supporting the Department's recommendations.

On October 13, 1994 the Bank asked the Commission to require Hertz to refund all amounts the Bank paid for intrastate service prior to June 30, 1993, the date Hertz received authority to provide intrastate service. The Bank renewed its claim that the other original complainant, Conveyors, Inc., had received a favorable settlement, while the Bank was merely offered a refund of undisputed overcharges due to a billing error. Finally, the Bank asked the Commission to make a finding that Hertz had violated Minnesota law by providing intrastate service without a certificate of authority.

The matter again came before the Commission on February 7, 1995. Appearances were as follows: Joshua S. Wirtschafter for the Department of Public Service; Susan Rester Miles for Hertz Technologies, Inc.; Michael Hatch for United Bankers' Bank.

FINDINGS AND CONCLUSIONS

IV. Misrepresentation Claim Not Taken Up

Having reviewed the entire record and having heard the arguments of the parties, the Commission finds it is in the public interest to accept the Settlement Agreement and to leave the Bank's misrepresentation claim to the courts, where the Bank has stated it is willing to pursue it.

The central allegation of the Bank's complaint is that Hertz's sales agent made oral misrepresentations on price comparability on which the Bank foreseeably and detrimentally relied. The Bank does not allege a pattern and practice of consumer deception requiring Commission action and systemic relief. Instead, the Bank alleges that specific oral representations made to it by a Hertz agent were false in light of its specific business situation. The Bank seeks monetary damages, not revocation of Hertz's certificate of authority or similar regulatory relief.

The Commission is not an ideal forum for this complaint. The Commission does not have institutional expertise in the law of contracts, business practices, or fraud. It cannot conduct evidentiary hearings and would have to refer the case to an Administrative Law Judge for recommended findings of fact. Giving this case the time and resources necessary to handle it properly would strain the Commission's ability to deal with other cases it has a clear duty to resolve and for which there is no other forum. For all these reasons, the Commission declines to take action on the Bank's misrepresentation claim.

V. Settlement Agreement Accepted

The Commission originally rejected the Settlement Agreement due to insufficient information and requested more information in the following areas: (1) the factual basis of the Bank's complaint, 2) the Department's reasons for concluding that no further refunds were in the public interest, (3) the range of remedies available for resolving the complaint, and (4) alternatives for dealing with any unauthorized provision of service by the Company. The parties have now supplied additional information and satisfied the Commission's concerns.

As explained above, further information on the factual basis of the Bank's complaint and the range of remedies available for resolving it has convinced the Commission that the judiciary is a better forum than the Commission for addressing the Bank's misrepresentation claims. Further information on the regulatory issues -- refunds and how to deal with the Company's intrastate activities before its certification date -- have convinced the Commission the public and the regulatory process are adequately protected by the Settlement Agreement.

Although the Company conducted business in this state before it received a certificate of authority, it stated without contradiction that it did not believe it needed one. It saw itself primarily as an interstate carrier. It provided intrastate service at cost, collecting AT&T's tariffed rates from its customers and forwarding them to AT&T. The Company was, however, liable to AT&T for all intrastate service used, whether or not the Company collected from its customers.¹ Unbeknownst to the Company, the Commission had held that arrangements which are at least very similar constituted the provision of intrastate service, for which a certificate of authority was required.

¹ See findings recommended by the Department as part of the Settlement Agreement, which the Commission accepts and adopts.

When the Company did apply for a certificate of authority in April of 1993, it fully disclosed the nature and extent of its intrastate activities to the Department. The Department did not investigate further or bring the matter to the Commission's attention; it had not yet incorporated into its standard analysis of certification dockets the decision that some at-cost sales of intrastate service required a certificate of authority.

The Commission is convinced no useful purpose would be served by rejecting the settlement and exploring the possibility of harsher action against the Company. No one was harmed by the Company's pre-certification intrastate activities.² The Company made no profit on them. It billed customers at federal tariffed rates, with the exception of a two month period when AT&T's computers were mis-programmed. The Company has since refunded all overcharges from that period.

The Company has demonstrated its willingness and ability to comply with regulatory requirements in all contacts with the Commission and the Department. It has complied with all regulatory requirements since it received its certificate of authority and has cooperated fully throughout the course of this investigation. Its pre-certification activities occurred during a period when the Department itself, charged with enforcing the Commission's Orders³, had not yet incorporated the new decision into its standard operating procedures.

The Commission concludes no useful purpose would be served by determining precisely whether or when the Company may have provided intrastate service without a certificate of authority. Any goal such a determination would serve has been served by this process and by the Settlement Agreement.

For all the reasons set forth above the Commission will accept the Settlement Agreement, which is attached hereto and incorporated herein.

ORDER

1. The Commission accepts the Settlement Agreement between the Department of Public Service and Hertz Technologies, Inc., copy attached, as an appropriate resolution of the issues in this docket.

² The Commission realizes the Bank believes it was harmed by oral misrepresentations, but the Commission has found the courts are better equipped to assess this claim and have full remedial authority over it.

³ Minn. Stat. § 216A.07, subd. 2.

2. The Commission accepts and adopts findings a through f from paragraph 3 of the Settlement Agreement.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)